PHOENIX LEGAL

Indian Arbitration Quarterly Roundup

Quarterly Review of Significant Arbitration Judgements (April 2022 to June 2022)

Authored by:

Vasanth Rajasekaran

Saurabh Babulkar

Harshvardhan Korada

In recent times, several noteworthy judgments have been rendered by the Indian courts in matters relating to the law of arbitration in India. Some decisions rendered in the second quarter of 2022 that discuss the legal position concerning the interpretation and applicability of provisions of the Arbitration and Conciliation Act, 1996 have been summarised below:

1. *M/s Tirupati Steels v. M/s Shubh Industrial Component & Anr.*

Citation: Civil Appeal No. 2941 of 2022
Decision Date: 19 April 2022

Pre-Deposit As Per The MSMED Act Is Mandatory To Challenge An Arbitral Award

Brief Facts: The parties are governed by the provisions of the Micro, Small and Medium Enterprises Development Act, 2006 (**MSMED Act**). The appellant, M/s Tirupati Steels, preferred a claim petition before the Micro and Small Enterprises Facilitation Council (**Council**) for the recovery of INR 1,40,13,053 and interest amounting to INR 1,32,20,100 which comes to a total amounting to INR 2,72,33,153. On the failure of conciliation proceedings, the dispute was referred to the Sole Arbitrator, who was appointed through the Council. The Sole Arbitrator passed an award in favour of the appellant, pursuant to which an execution petition was filed before the District and Sessions Judge, Faridabad (**Faridabad Court**). Thereafter, the respondent, M/s Shubh Industrial Component, filed an application before the Special Commercial Court, Gurugram (**Gurugram Court**) under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) for setting aside the arbitral award.

It was contended by the appellant that Section 19 of the MSMED Act directs the judgment debtor to deposit 75% of the arbitral award. The Gurugram Court granted six weeks' time to the Respondent to deposit 75% of the arbitral award before the application filed under Section 34 of the Arbitration Act could be entertained by the Court. Feeling aggrieved with the order passed by the Special Commercial Court, respondent filed the commercial appeal before the High Court. The Division Bench of the Punjab and Haryana High Court, while upholding the vires of Section 19 of the MSMED Act held that the pre-deposit of 75% of the arbitral award under Section 19 of the MSMED Act is merely directory in nature and not mandatory. Thereby, it permitted the proceedings under Section 34 of the Arbitration Act to continue without insistence on making a pre-deposit of 75% of the awarded amount. Feeling aggrieved with the impugned order the appellant had preferred the present appeal before the Supreme Court.

Issue: Whether the pre-deposit of 75% of the awarded amount as per Section 19 of the MSMED Act, 2006, while challenging an award under Section 34 of the Arbitration Act, 1996, is made mandatory or not?

Decision: While interpreting Section 19 of the MSMED Act and relying upon the case of *Goodyear (India) Ltd. v. Norton Intech Rubbers (P) Ltd.*, (2012) 6 SCC 345, the Supreme Court observed that the requirement of deposit of 75% of the amount in terms of the award as a pre-deposit as per Section 19 of the MSMED Act is mandatory. However, the Supreme Court also observed that considering the hardship which may be projected before the appellate court and if the appellate court is satisfied that there shall be undue hardship caused to the

appellant to deposit 75% of the awarded amount as a pre-deposit at a time, the court may allow the pre-deposit to be made in instalments. Ultimately, the Supreme Court held that the order passed by the High Court is unsustainable and thus, deserves to be quashed and set aside.

2. *BBR (India) Pvt Ltd v. SP Singla Constructions Pvt Ltd.*

Citation: Civil Appeal Nos. 4130-4131 of 2022
Decision date: 18 May 2022

Conducting Arbitration Proceedings At A New Place Owing To The Appointment Of A New Arbitrator Would Not Shift The Seat Of The Arbitration

Brief Facts: BBR (India) Private Limited (**the Appellant**) and S.P. Singla Constructions Private Limited (**the Respondent**) had entered into a contract dated 30.06.2011, under which the Appellant was required to supply, install and undertake stressing of cable strays for the 592 metre long cable stay bridge being constructed by the Respondent. A letter of intent issued to the developer had an arbitration clause for resolution of disputes by a Sole Arbitrator. However, the clause was silent and did not stipulate the seat or venue of arbitration. The contract and letter of intent were executed at Panchkula in Haryana, as the corporate office of the Respondent is also located at Panchkula. However, the registered office of the Appellant is located in Bengaluru, Karnataka. When dispute arose between the parties, the Tribunal held that the venue of the proceeding would be in Panchkula, and neither party objected to the place of arbitration proceedings as fixed by the Arbitral Tribunal. Soon after, the Sole Arbitrator recused himself from the proceedings citing personal reasons, and a new Arbitrator took over as the Sole Arbitrator and recorded his consent in the first procedural order dated 30.06.2015, wherein the venue of the proceeding was stated to be Delhi. Accordingly, the proceedings took place at Delhi, even the award was pronounced and signed in Delhi on 29.01.2016. The Appellant filed a petition challenging the award under Section 34 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) before the Delhi High Court on 28.04.2016, whereas the Respondent filed an application for interim orders under Section 9 of the Arbitration Act before the Additional District Judge, Panchkula, on 07.05.2016. As the Appellant and Respondent invoked the jurisdiction of two different courts, the question of the 'jurisdictional seat of arbitration' assumed importance in this matter.

The petition filed by the Respondent under Section 9 was dismissed on the ground of lack of territorial jurisdiction, recording that the jurisdiction to entertain the application vests solely with the Delhi High Court, where a prior petition under Section 34 had been filed, and was pending. However, this order was later set aside by the High Court of Punjab and Haryana (**Punjab High Court**) with the finding that the courts of Delhi did not have the jurisdiction to entertain the objections under Section 34 of the Arbitration Act. The Punjab High Court further recorded that the agreement between the parties was silent as to 'the seat' of the arbitration proceedings, and even the Arbitrator had not determined Delhi to be the 'seat of arbitration'. While relying on the decisions rendered by the Supreme Court, the Punjab High Court held that the courts at Panchkula had jurisdiction to deal with the case. Aggrieved by the same, the Appellant filed the instant petition before the Supreme Court.

Issue: What will be the jurisdictional seat of the arbitration in the instant case?

Decision: The Supreme Court observed that if the arbitration proceedings were held throughout in Panchkula, there would have been no difficulty in holding that Delhi is not the jurisdictional 'seat'. However, that was not the case, as after the appointment of the new Sole Arbitrator the arbitration proceedings were held at Delhi. When first order passed by the Arbitral Tribunal it indicated that the place of the proceedings would be Panchkula in Haryana, and in the absence of other significant indica on application of Section 20(2) of the Arbitration Act, Panchkula would be the jurisdictional 'seat' of arbitration. The Supreme Court further held that when the seat is once fixed by the Arbitral Tribunal under Section 20(2), it should remain static and fixed; whereas the 'venue' of arbitration can change and move from 'the seat' to a new location. A pivotal point that the Apex Court had reiterate here is that the venue is not constant and stationary and can move and change in terms of Sub-Section (3) to Section 20 of Arbitration Act, however, this change of venue does not result in change or relocation of the 'seat of arbitration'. While relying upon *BGS SGS Soma JV v. NHPC Limited*, the Supreme Court opined that once the jurisdictional 'seat' of arbitration is fixed in terms of Sub-Section (2) of Section 20 of Arbitration Act, then, without the express mutual consent of the parties to the arbitration, 'the seat' cannot be changed. Therefore, while dismissing the appeal, the Court held that the appointment of a new Arbitrator who holds the arbitration proceedings at a different location would not change the jurisdictional 'seat' already fixed by the earlier or first Arbitrator. The place of arbitration in such an event should be treated as a venue where arbitration proceedings are held.

3. *Mr. Rajesh Gupta v. Ram Avtar*

Citation: O.M.P. (Comm.) 121 of 2020
Decision date: 19 May 2022

Forfeiture Of The Consideration Without Proof Cannot Be Allowed By The Arbitrator On The Ground Of It Being Referred To As Earnest Money

Brief Facts: The parties to the dispute entered into an Agreement to Sell and Purchase Cum Receipt (**Agreement**) dated 05.12.2008, as per which, the petitioner agreed to purchase the manufacturing unit including the built-up factory, rights in the leasehold property No. C-37, Sector B-2, Tronica City, Loni Ghaziabad and all movable assets (**the Property**) for a sale consideration of INR 1,60,00,000. As the petitioner paid a sum of INR 60,00,000 to the respondent, the receipt of the said amount was expressly acknowledged in the Agreement as receipt of 'earnest money'. After entering into the Agreement, the petitioner claimed that the respondent had committed fraud by representing that the entire constructed area of the factory premises was 10,000 sq. ft. However, upon taking measurements, the actual constructed area was found to be only 6,500 sq. ft. Subsequently, the petitioner sent a legal notice calling upon the respondent to either refund the amount paid i.e., INR 60,00,000, or in the alternative, execute the sale deed in respect of the factory premises based on actual measurements. When the respondent failed to respond to the said legal notice, the petitioner filed a suit before the Delhi High Court for recovery of the earnest money along with damages. In response, an application under Section 8 of the Arbitration and Conciliation Act, 1996

(**Arbitration Act**) was filed by the respondent, which was also allowed and the parties were referred to arbitration under the aegis of the Delhi International Arbitration Centre.

Before the Arbitral Tribunal, the petitioner claimed an amount of INR 1,20,00,000 due to the failure on the part of the respondent in fulfilling his obligations under the Agreement. Additionally, besides costs, the petitioner also claimed *pendente lite* interest as well as future interest at the rate of 18% per annum and 5% per annum respectively to be compounded quarterly. All the claims of the petitioner were rejected on the ground that it was incumbent upon the petitioner to make reasonable inquiry as to the area of the property and held that the doctrine of *'caveat emptor'* applied to the facts of the case. The Arbitral Tribunal also rejected the petitioner's contention that the sum of INR 60,00,000 paid by the petitioner was part payment of the consideration and not earnest money. Consequently, the respondent was entitled to forfeit the same in terms of the Agreement. Aggrieved by this, the petitioner filed the present petition under Section 34 of the Arbitration Act challenging the award.

Issues:

1. Whether there was any misrepresentation on the part of the respondent with respect to the constructed area?
2. Whether the Arbitral Tribunal erred in denying the petitioner's claim for a refund of INR 60,00,000?

Decision: While deliberating upon the first issue, the High Court noted that the Agreement expressly indicated that the respondent had constructed an area of 10,000 sq. ft. However, on an independent assessment by the architect, it was established during the arbitral proceedings that the constructed area was neither 6,500 sq. ft nor 10,000 sq. ft. but was actually 7,506 sq. ft. Therefore, the representation regarding the covered area as reflected in the Agreement was held to be incorrect. The High Court observed that although it is not stated explicitly in so many words, but it was discernible from the impugned award that the Sole Arbitrator was of the view that the reduced area was not material. The High Court opined that it was difficult to accept that a reduced area of the Property to the extent of almost 25% could be considered as not material. The High Court also observed that the principle of '*caveat emptor*' did not apply where an express representation is made by the seller and is relied upon by the purchaser. The High Court then referred to the decision of the Sole Arbitrator holding the claim of the petitioner to be barred under the exception clause mentioned in Section 19 of the Indian Contract Act. In view of the limited scope of intervention under Section 34, and the general rule that a court could not supplant its understanding with that of the Arbitrator, the High Court held that the Arbitrator's observation on the claim being barred under Section 19 of the Indian Contract Act did not warrant any interference under Section 34 of the Arbitration Act.

For the second issue, the High Court noted that the Sole Arbitrator had held that the payment of INR 60,00,000 could not be taken up as part payment of the sale price as it was made in the nature of earnest money, and as per Clause 12 of the Agreement, the respondent was entitled to the entire earnest money in the event of the failure on the part of the petitioner to fulfill his obligations under the Agreement. In this regard, the High Court opined that the question of whether an amount of INR 60,00,000 could be considered as a guarantee for entering into a binding contract was also required to be considered keeping in view the

quantum of the said amount. The fact that the amount was merely referred to as 'earnest money' in the Agreement would not necessarily cater to the question of the amount being in fact earnest money or being paid as part of the consideration. The High Court, thus, observed that a sum of INR 60,00,000 which represented substantial portion of the total consideration (i.e., 37.5%) could not be forfeited without the respondent establishing that he had suffered any loss. Reliance was also placed by the High Court on the decision in *Kailash Nath Associates v. Delhi Development Authority and Anr.,*[1] to reiterate that Section 74 of the Contract Act applies to forfeiture of earnest money and the requirement to prove the actual loss is not dispensed with. Thus, the High Court held that without the respondent establishing that it had suffered any loss on account of the petitioner failing to close the transaction for the purchase of the Property, it would be impermissible for the respondent to forfeit the amount of INR 60,00,000, which admittedly is not a nominal amount and constitutes a substantial portion of the consideration. Accordingly, the impugned arbitral award was set aside to the extent that it accepts that the respondent was entitled to forfeit the amount of INR 60,00,000.

4. *Vistrat Real Estate Private Limited v. Asian Hotels North Ltd.*

Citation: Arb. (P) 1124/2021
Decision date: 22 April 2022

The Decision To Join Parties Who Are Not Signatories To The Arbitration Agreement Lies In The Domain Of The Arbitrator

Brief Facts: Vistrat Real Estate Private Limited (**Vistrat**), the petitioner, purchased 6 floors along with its car parking areas in New Delhi from the respondent, Asian Hotels North Ltd. (**AHNL**), vide four registered Sale Deeds dated 12.05.2014 along with perpetual right to use car parking area. The petitioner transferred and assigned all rights and title of the premises to IndusInd Bank Limited along with the perpetual right to use the car parking area. Accordingly, the petitioner sought for a refund of the security deposit of INR 15 Crores that was deposited by the petitioner pursuant to Refundable Security Deposit Agreement (**Agreement**) dated 12.05.2014, which was entered into between the petitioner and the respondent. As the claim of the petitioner was in terms of the Agreement, Clause 7 of the same provided for an arbitration clause that stated that if the dispute is not resolved though such discussion within 30 days after one party has served a written notice requesting the commencement of discussions, then such dispute shall be referred, at the request of either of the parties, to a binding arbitration in accordance with Arbitration and Conciliation Act, 1996 (**Arbitration Act**). Subsequently, a demand notice was issued by the Petitioner, but the same was not responded to. This compelled the petitioner to issue another notice giving 30 days' time for resolution of the disputes; failing which the arbitration should be invoked in terms of the Agreements. However, even this notice was not replied by the respondent. Hence, the petitioner filed the instance petition under Section 11(6) of the Arbitration Act requesting to appoint an Arbitrator.

The respondents contended that since the property has been sold off by the petitioner to some other party, the respondent has to take the refundable security deposit money from

[1] *Kailash Nath Associates v. Delhi Development Authority and Anr.*, 2015 4 SCC 13

the said third party. Accordingly, a no reply affidavit was filed despite time having been granted, and the respondent claimed that in view of a third-party intervention, the dispute cannot be referred to arbitration as the third party is not a signatory to the Agreement. Further, clause 2 and 3 of the Agreement reads that the amount of refundable security deposit shall be refunded by AHNL to Vistrat within 7 days from the date on which Vistrat transfers the title of the property to any third party, and that it shall be the responsibility of Vistrat to ensure that at the time of sale of the property to any third party, such third party shall provide the refundable security deposit of INR 60,00,000 in its name to AHNL before the refundable security deposit provided by Vistrat is refunded to Vistrat by AHNL. Pursuant to this clause, the respondent contended that as the petitioner has sold off the property to the third party, it was the third party that was required to give a refundable security to the respondent. However, since the same has not been done in the instant dispute, it was argued by the Respondent that because of the rights of a third party being involved in the matter as well, an Arbitrator cannot be appointed to adjudicate the disputes arising between the parties.

Issue: Whether in the absence of a third party, the petitioner can claim the refundable security deposit would be for the learned Arbitrator to determine?

Decision: It was noted by the Delhi High Court (**High Court**) that while the petitioner sought for reference to arbitration in terms of Clause 7 of the Agreements, Clauses 2 and 3 of the Agreements also played an integral part by providing that only when the third party provides for the refundable security deposit to the respondent, is when the petitioner can claim the deposit. Reliance was placed by the High Court on the Supreme Court decision of *Chloro Controls India Private Ltd. v. Severn Trent Water Purification Inc.*, (2013) 1 SCC 641, wherein while dealing with an international arbitration under Section 45 of the Arbitration Act, the Supreme Court held that even third parties who are not signatories to the arbitration agreement can be joined in arbitration. The judgement also lays down categories where the third parties can be impleaded to the arbitration; including the implied consent theory (where the intentions of the third-party beneficiaries come at play), and doctrines of agent-principal, relations, apparent authority, piercing of veil, joint venture relations, succession and estoppel – all that may be applied to bind a non-signatory to an arbitration.

The High Court, thus, held that once a valid arbitration agreement exists between the parties, the issue whether the petitioner is entitled to any relief in the absence of a third party to the agreement or that third party is required to be impleaded in the proceedings, is covered by the *Doctrine of Competence-Competence* and it will be for the Arbitrator to decide the said issue. For this, the Supreme Court case of *Shin Etsu Chemical Co. Ltd. v. Aksh Optifibre Ltd.*, (2005) 7 SCC 234 was emphasized upon by the High Court, which highlighted that the rule of priority in favour of the Arbitrators is counterbalanced by the courts' power to review the existence/validity of the arbitration agreement at the end of the arbitral process. Therefore, the correct approach to the review of the arbitration agreement is restricted itself to *prima facie* finding and have the courts' reviewing of the arbitration agreement to be limited to the principle of competence-competence.

5. *Union of India, Ministry of Railways & Anr. v. M/S Jindal Rail Infrastructure Limited*

Citation: OMP (COMM) 227/2019
Decision date: 23 May 2022

Commercial Difficulty Is Not A Ground For Allowing The Arbitrator To Amend The Arbitration Agreement

The petitioner, Ministry of Railways (Railways) issued a 'Bid Invitation and Schedule of Requirement' ('Tender') on 13.01.2015. Pursuant to the said invitation, the respondent, Jindal Rail Infrastructure Limited (JRIL) submitted its bid, and the same was accepted as the lowest bidder by the Railways. Subsequently, Railways issued the Letter of Acceptance communicating its decision to place an order on JRIL for the supply of the wagons at the price as quoted by JRIL. Thereafter, the parties entered into the contract (Agreement), as per which the Railways issued an order for the supply of two tranches of wagons, the first having 1403 wagons and the second tranche having 468. On 28.08.2015, the Railways awarded a contract for the supply of 1075 numbers of wagons, wherein 100 were sought at the L-1 rates (lowest bid) and the rest were sought at the rate of L-2 (that was agreed with another party). Aggrieved by the dual pricing, JRIL made a representation stating that the Notice Inviting Tender did not indicate that there would be two rates applicable for the supply of wagons by different bidders.

The agreement had an 'Optional Clause' which conferred on the Railways the right to change the quantity ordered up to 30% of the ordered quantity during the currency of the Agreement, on the same price and terms and conditions, with a suitable extension in the delivery period for the optional quantity. On 08.04.2016, an amendment was made to the Agreement, wherein the Railways exercised its right reserved under the Option Clause and increased the ordered quantity of wagons by 496 numbers. The delivery period for the aforesaid quantity was increased by five months from the existing delivery period. In the meantime, another tender was floated by the Railways. JRIL was again awarded this contract and was required to supply and manufacture 292 wagons. Pursuant to this award, JRIL preferred another representation requesting the Railways to revise the payment due to it at the L-2 rates. On receiving no positive response, JRIL invoked the arbitration agreement to have its claims adjudicated.

In its statement of claim, JRIL raised six claims before the Arbitral Tribunal. The Arbitral Tribunal on the issue of dual pricing, held that even if the Tender was treated as a part of the Agreement between the parties, there was no stipulation that in the event the purchase orders are placed at L-2 rates with any party, the L-1 bidder (that is, JRIL) would be entitled to L-2 rates. However, the Arbitral Tribunal also noted that the additional order made under the amendment was in breach of the terms of the Agreement, as when the costs of manufacture of wagons and market price for supply of wagons had gone up substantially, the Railways could not have ordered additional quantity at the same pre-decided price. Accordingly, it was held that the parties could not have intended for the Railways to exercise an option of increasing the quantity if the price in the market or the cost of production had increased, rendering it commercially unviable to manufacture and supply the said wagons.

The arbitral award rendered in the instant matter was challenged before the High Court by the Railways on several grounds, one of them being that the Arbitrator had ignored the express terms of the agreement between the parties and had re-worked upon the bargain that was reached between the parties.

Issue: Whether an Arbitrator can re-write the terms of the arbitration agreement if the same appears to be patently commercially unviable for any one of the parties to perform?

Decision: The High Court opined that a commercial contract between the parties cannot be avoided on the ground that one of the parties subsequently finds it commercially unviable to perform the same. In the present case, the High Court observed that the Arbitral Tribunal had essentially re-worked the bargain between the parties and re-written the contract which cannot be permitted by the courts. The High Court relied on the Supreme Court case of *PSA SICAL Terminals Pvt. Ltd v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors.*[2], wherein it was held that re-writing a contract for the parties would be a breach of fundamental principles of justice and could be only resorted to under exceptional circumstances.

While noting that an arbitral award based on a plausible interpretation of a contract cannot be interfered with under the provisions of Section 34 of the Arbitration Act, the High Court also reaffirmed that it cannot accept the Arbitral Tribunal's interpretation that the terms of the agreement '*flouts business common sense*'. The High Court ultimately held that only in cases where the terms of the contract do not clearly express the intentions of the parties, can the Courts use various tools of interpretation to ascertain the intent. However, Courts are not open to re-work a bargain that was struck between the parties on the ground that it is commercially difficult for one party to perform the same.

6. *Om Praksah Kumawat v. Hero Housing Finance Ltd*

Citation: S.B. Civil Writ Petition No. 6199/2022
Decision date: 1 May 2022

Presence Of An Arbitration Agreement Between The Parties Is Not A Bar To The Institution Of Proceedings Under The SARFAESI Act.

Brief Facts: The Chief Metropolitan Magistrate, Jaipur under Section 14 of the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002 (**SARFAESI**) had passed an order dated 15.03.2022 wherein direction were given to the respondent to grant them benefit of moratorium. The instant writ petition has been filed by the borrowers for quashing the said order. The petitioners had submitted that in view of existence of an arbitration clause in the loan agreement and filing of an application under Section 9 of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**) by the respondent, the respondent could not have resorted to the provisions of Section 14 of the SARFAESI Act. Accordingly, it was prayed that the writ petition be allowed and the order impugned dated

[2] *PSA SICAL Terminals Pvt. Ltd v. Board of Trustees of V.O. Chidambranar Port Trust Tuticorin and Ors.*, 2021 SCC OnLine SC 508.

15.03.2022 be quashed and set aside. On the other hand, the respondent contended that the writ petition is not maintainable as the petitioners have an alternative and efficacious remedy under Section 17 of the SARFAESI Act. It was also submitted by the respondent that the objection of the petitioner as to maintainability of proceedings under SARFAESI Act in view of arbitration clause, is not sustainable.

Issue: Whether a proceeding under SARFAESI is maintainable if the parties have an arbitration agreement between them?

Decision: The High Court of Rajasthan (**High Court**) in the instant writ petition observed that the contention of the petitioners that in view of availability of arbitration clause and invocation of Section 9 of the Arbitration Act, the proceedings under the SARFAESI Act could not have been resorted to, holds no water. Reliance was placed on *M.D. Frozen Foods Exports Pvt. Ltd. & Ors. v. Hero Fincorp Ltd*., Civil Appeal No.15147/2017 which observed that SARFAESI proceedings are in the nature of enforcement proceedings, while arbitration is an adjudicatory process, and so in the event that the secured assets are insufficient to satisfy the debts, the secured creditor can proceed against other assets in execution against the debtor, after determination of the pending outstanding amount by a competent forum. Even in the case of *Indiabulls Housing Finance Limited v. M/s. Deccan Chronicle Holdings Limited & Ors.* in Civil Appeal No.18/2018, wherein, in an appeal preferred against the judgment of the High Court of Andhra Pradesh holding that where Section 9 of the Arbitration Act was invoked by the creditor, initiation of proceedings under the SARFAESI Act was impermissible, the Apex Court, after appreciating Sections 35 & 37 of the SARFAESI Act, held that arbitration proceedings and proceedings under the SARFAESI Act can be resorted to simultaneously. Lastly, while considering the cases cited by the petitioner the High Court noted that in both, *SBP & Co.* and *Vidya Drolia*, the Apex Court of India was dealing with remedy before a Civil Court vis-a-vis availability of arbitration clause and in none of the cases provisions of the SARFAESI Act were involved, thus, not making them applicable to the instant case. Accordingly, the writ petition was dismissed in view of availability of alternative remedy to the petitioners under the provisions of the SARFAESI Act.

7. *State of Rajasthan v. Godhara Construction Company*

Citation: S.B. Civil Miscellaneous Appeal No. 511/2009
Decision date: 5 May 2022

Section 5 Of The Limitation Act Cannot Be Applied To Condone A Delay Beyond The Period Provided Under Section 34(3) Of The Arbitration and Conciliation Act

Brief Facts: A work contract was given to the respondents, Godhara Construction Company, for renewal work on Agra Road, NH-11 for which Agreement No.26, year 1993-94 was executed between the parties. There was an arbitration clause in this Agreement to resolve the dispute. During the progress of the work, dispute arose between the parties. Then the respondents submitted application before the District Judge under Sections 10 and 11 of the Arbitration and Conciliation Act 1996 (**Arbitration Act**), who appointed an Arbitrator vide order dated 28.08.1998 to resolve the dispute. After hearing both sides, the Arbitrator passed an award of INR 4,33,161.79 with interest @ 18% vide award dated 29.07.2000 in favour of

the respondents. When the award was not satisfied, the respondents submitted an application before the Court of District Judge, Jaipur. The notices of this application were served upon the appellant-State of Rajasthan, pursuant to which the appellant submitted its objections on 22.02.2001. Since there was delay in filing objections, an application under Section 5 of the Limitation Act was submitted for condoning the delay. However, the Additional District Judge Jaipur rejected the objections vide impugned order dated 30.08.2008 by holding that the objections were not filed within the time of limitation prescribed under Section 34(3) of the Arbitration Act and held that the objections cannot be decided on merits as the same were beyond limitation.

The appellant submitted that the copy of the award was not made available to the officer-in-charge of the appellant by the Arbitrator, thus causing the delay in filing the objections. The respondent had submitted that the objections were submitted beyond the prescribed limitation period were not maintainable, especially as the appellant had participated in the entire arbitration proceeding and was well aware about the passing of the award. Aggrieved by the judgment passed by the Court of Additional District and Sessions Judge, Jaipur, whereby the objections filed by the appellant-State under Section 34 of the Arbitration Act against the arbitral award was rejected, the appellant filed an appeal before the Rajasthan High Court (**High Court**).

Issues: Whether the delay in filing the objection petition under Section 34 of the Arbitration Act is condonable by exercise of power under Section 5 of Limitation Act?

Decision: While relying upon the Supreme Court case of *Union of India v. Popular Construction Co.*, 2001 (3) Arb. LR 345 (SC), the High Court highlighted that the scope available for condonation of delay is self-contained in the proviso to Section 34(3) and Section 5 of Limitation Act is as such, not applicable. Several Supreme Court cases were referred by the High Court to reiterate the jurisprudence available on the issue that while Section 5 of the Limitation Act does not place any outer limit in regard to the period of delay that could be condoned, the proviso to Sub-Section (3) of Section 34 of the Act places a limit on the period of condonable delay by using the words "*may entertain the application within a further period of thirty days, but not thereafter*". Therefore, if a petition is filed beyond the prescribed period of three months, the court has the discretion to condone the delay only to an extent of thirty days, provided sufficient cause is shown. Where a petition is filed beyond three months plus thirty days, even if sufficient cause is made out, the delay cannot be condoned.

As far the present case was concerned, the award was passed by the Arbitral Tribunal on 29.07.2000 and in spite of contesting and participating in the arbitral proceedings before the Arbitrator, the objections were not submitted under Section 34(3) of the Arbitration Act within time. It was noted by the High Court that the Court below had taken all these facts into consideration and rejected the objections raised by the appellant-State of Rajasthan by treating the same as beyond limitation. Therefore, even the High Court was of the opinion that the application under Section 34(3) of the Arbitration Act filed by the appellant for setting aside the arbitral award dated 29.07.2000 was beyond the mandatory period of limitation permitted under the Arbitration Act, and hence, the same could not have been entertained by taking the recourse of the provisions of the Limitation Act.

8. *Roop Singh Bhatty v. Shriram City Union Finance Ltd*

Citation: C.R.P. No. 1354 and 1934 of 2021
Decision date: 8 April 2022

Award Passed By An Arbitrator After The Expiry Of The Time Period Prescribed In Section 29A Of The Act Will Be Nullity And Void Ab Initio

Brief Facts: In the present case, there are two revision petitions, stemming from similar factual matrix by the same parties. In the first revision petition, the respondent, M/s. Shriram City Union Finance Limited, sanctioned a sum of INR 25,00,000 to the petitioner, Roop Singh. The petitioner had agreed to repay the loan amount with financial charges, bringing the total payable amount to INR 45,62,250 to be payable in 60 instalments. However, the petitioner failed to pay the full loan amount and committed default. Subsequently, the respondent invoked the arbitration clause, and a claim statement was made by the respondents before the Sole Arbitrator on 27.04.2016. The petitioners filed their defence statement on 21.12.2016, and the Arbitrator passed the award on 27.12.2017. However, as the amount quantified by the Arbitrator was not paid, the respondent filed an execution petition seeking for the enforcement of the award. The Execution Court over-ruled the objection raised by the petitioners and declared that decree holder is entitled for recovery of amount and allowed Execution Petition. Aggrieved by the same, a revision petition is filed.

Similarly, for the second petition, the facts are such that the respondent sanctioned a sum of INR 20,00,000 to the petitioner, who agreed to repay the loan amount with financial charges, bringing the total payable amount to INR 36,49,980 to be payable in 60 instalments. As loan is not discharged by the petitioners, the respondent invoked the arbitration clause. A Claim Statement was made by the respondents before the Sole Arbitrator on 27.04.2016. The petitioners filed their defence statement on 18.10.2016. The Arbitrator passed the award on 09.08.2017. However, as the amount quantified by the Arbitrator was not paid, the respondent filed an execution petition seeking for the enforcement of the award. The Execution Court over-ruled the objection raised by the petitioners and declared that decree holder is entitled for recovery of amount and allowed Execution Petition. Aggrieved by the same, this revision petition is filed. As the issue raised in both revision petitions is same, both revisions are considered together before the Telangana High Court.

The petitioners contended that as the award was not passed within one year from the date of filing claim by the respondent, the award is a nullity and therefore cannot be enforced. It was also contended that the execution Court failed to consider the objection raised by the petitioners on the face of Section 29A(1) and Section 29A(3) of the Arbitration and Conciliation Act, 1996 (**Arbitration Act**). As per Section 29A(1) of the Arbitration Act, an award should be made within a period of twelve months from the date of Arbitral Tribunal enters upon the reference. Section 29A(3) of the Arbitration Act gives power to the parties to extend this time period for a further period not exceeding six months. Section 29A(4) of the Arbitration Act specifies that if the award is not passed within the time period prescribed in clause (1) or clause (3) then the mandate of Arbitrator would terminate.

On the other hand, the respondents contended that the petitioners took very long time to file their defence as against the permissible time of six months and hence the period of twelve months should be reckoned from 21.12.2016 and 18.10.2016 respectively and the period of twelve months expires by 21.12.2017 and 18.10.2017 respectively. Thus, within one year after filing the written statement, the award was passed. It was further contended that Section 29A of the Arbitration Act only lays down procedure and non-compliance thereof does not vitiate the award.

Issues: Whether, in light of the scope of Section 29A of the Arbitration Act, the awards of the Arbitrators were sustainable and, if, Execution Petitions were maintainable?

Decision: The High Court noted that Section 29A of the Arbitration Act mandates that the award should be passed within a period of twelve months from the date Arbitration Tribunal enters appearance. While its sub-Section (3) enables parties by consent to extend the time by further period of six months, its sub-Section (4) stated that after the initial period of one year and extended period of six months, if extended by consent, the mandate of the Arbitrator terminates. Thus, he becomes *functus-officio* after that period and, therefore, seizes to be an Arbitrator. Thus, the High Court held that the disputes raised in these two revisions were covered by unamended Section 29-A. From the dates and events of these two cases, it was apparent that the concerned Arbitrators passed awards after one year of entering appearance. Therefore, the Arbitrators had became *functus officio* one year after entering appearance and were wholly incompetent to deal with the disputes and pass any award(s). Thus, the High Court held that the awards passed by the Arbitrators are a nullity and void ab initio. The execution Court grossly erred in not appreciating this aspect, that as in law there does not exist any awards, therefore question of enforcement of such awards would also not arise.

9. *K.K Ibrahim v. Cochin Kaagaz*

Citation: OP (C) No. 674 of 2020
Decision date: 8 June 2022

Parties Cannot Claim For Refund Of Court Fees After An Unsuccessful Attempt At Arbitration

Brief Facts: An original petition under Article 227 of the Constitution of India is filed by the plaintiff, seeking modification of an order passed whereby the Sub Judge referred the parties in the Suit for arbitration after closing the Suit, without any order for refunding the 1/10th court fees that was paid by the plaintiff in the Suit. The Plaintiff had submitted that as they paid 1/10 court fee to the tune of INR 1,21,840 at the time of institution of the Suit, and now, since the parties were referred to arbitration, the plaintiff is thus, entitled to get return of the 1/10 court fee paid by them. It was also contended by the Plaintiff that as per Section 69A of the Kerala Court Fees and Suits Valuation Act (**Kerela Court Fees Act**), in case where the dispute is settled under Section 89 of the Code of Civil Procedure (**CPC**) the refund of court-fee shall be entitled to the parties by whom the fee was paid. Thereby, establishing that Section 69A of the Act makes the position without any iota of doubt that refund of court fee

is provided only when a Suit, appeal or other proceedings before any court is settled by recourse to Section 89 of C.P.C and refund is not permissible on mere reference of parties.

While pressing for refund of court fee, the petitioner placed reliance on the case of *Manilal Panicker S. v. Titto Abraham*, 2011(4) KHC 568 rendered by the division bench of the Kerala High Court itself. In the said case, the High Court held that where a compromise or settlement has been arrived at the Lok Adalat in a case referred to it, the entire court fee paid, whether it is 1/3rd, 1/10th or one half, shall be refunded in the manner provided under Central Court Fees Act. The above decision referred to Section 21 of the Legal Services Authorities Act, 1987, holding that the said provision envisages refund of court fees in the manner provided under the Central Court Fees Act. It further held that full amount of the court fee paid in respect of the plaint in a case where the court has referred the parties to the suit to any one of the ADR mechanisms enumerated under Section 89(1) of CPC, is to be refunded on settlement or compromise before it.

Issues: Would a mere reference of a party for settlement by recourse to Section 89 of the CPC entitle refund of court fee as provided under Section 69A of the Kerala Court Fees Act, though the matter not settled finally?

Decision: The Kerala High Court noted that a plain reading of Section 69A makes it clear that when a proceeding before any court is settled by recourse to Section 89 of CPC, the whole court fee paid shall be refunded except in interlocutory matters. Thus, it was clear that Section 69A of the Act would come into play only when the case is settled by recourse to Section 89 of CPC. In the present case, as per the High Court, the petitioner did not produce any material to substantiate the fact that on reference to arbitration, the dispute was settled. In view of the same, the contention raised by the petitioner to the effect that the petitioner is entitled to get 1/10th of the court fee paid merely because the parties were referred to arbitration by recourse to Section 69 of the Kerala Court Fees Act cannot sustain and therefore, the said contention is found against.

10. *Sukumar Ray v. M/s Indo-Industrial Services and Ors.*

Citation: A.P No. 70 of 2022
Decision date: 21 April 2022

Subsequent Agreement Having Specific Reference To The Original Agreement Need Not Have A Separate Arbitration Clause And Can Invoke The Original Arbitration Clause

Brief Facts: The parties in the present case had entered into an agreement dated 29.05.2018 for financial accommodation. In terms of the said agreement, the petitioner lent and advanced a sum of INR 10,00,000 by way of cheque to the respondents. The agreement also included an arbitration clause under its Clause (viii). Later on, the parties entered into a subsequent agreement dated 20.052019, which extended the time for repayment of the loan amount of INR 10,00,000 till 28.05.2020. The quarterly payments of the accrued interest were also continued and extended till 28.05.2020.

The petitioner submitted that the respondents failed to make payment of the accrued interest along with the principal amount since 20.10.2020. While, on several occasions the petitioner demanded payment of the aforesaid loan amount along with accrued interest, but the same was never paid. The petitioner had even written letters to the respondents to mutually decide on the issue of appointment of an Arbitrator as per the agreement, but the same were not been confirmed by the respondent. Therefore, the present application was filed to seek appointment on an Arbitrator as per Clause (viii) of the arbitration agreement. However, the respondent contended that there is no valid and binding arbitration agreement between the parties and the same has expired due to efflux of time. Further, it submitted that the subsequent agreement for financial accommodation dated 29.05.2019 does not contain an arbitration clause and there is no specific adoption of Clause (viii) of the Agreement for Financial Accommodation. Reliance has been placed on *M.R. Engineers and Contractors Private Limited v. Som Datt Builders Limited*, (2009) 7 SCC 696 to contend that specific adoption of the arbitration clause should take place in a subsequent agreement and only then the court can refer the dispute to arbitration by appointing an Arbitrator as per the earlier agreement.

Issues: Whether a subsequent agreement that only extends the validity of the original agreement requires an express arbitration clause?

Decision: The Calcutta High Court noted that the subsequent agreement dated 29.05.2019 is a mere agreement for extension of validity of the original agreement and adopts all the provisions of the original agreement on the aspect of resolution of disputes between the parties by arbitration. The New Clause of the subsequent agreement provides for a specific reference to the original agreement and extends the same till 28.05.2020. Further, upon a reading of the relevant clauses, nowhere it appears that the parties intended to enter into a new agreement for any specific purpose other than extension of validity of the original agreement. In fact the phrase "*that, all other terms and conditions will remain same as per the original agreement dated May 29, 2018*". used in Clause 2 of the subsequent agreement make it apparent that the parties intended to adopt the arbitration clause of the original agreement. The High Court also observed that the case relied by the respondent is misplaced, as the facts of the case are not applicable to the present case. Further, *M.R. Engineers* emphasises on the point of mutual intention between the parties and interprets the contracts entered into between the parties, and in the present case, the point of mutual intention and its interpretation goes on to show that the mutual intention between the parties and the nature of subsequent agreement in the present case are to continue with the arbitration clause in the earlier agreement. Accordingly, the application was allowed.

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